TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages:

Pages:

Statutes: *Pages:*

Miscellaneous: *Pages:*

Pages:

No. 92-602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ST. MARY'S HONOR CENTER AND STEVEN LONG,
Petitioners,

v.

MELVIN HICKS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT MELVIN HICKS

STATEMENT OF THE CASE

Respondent Melvin Hicks, an African-American, began working as a correctional officer at St. Mary's Honor Center, a facility of the Missouri Division of Corrections, in 1978. In 1980, he was promoted to shift commander. In 1984, Hicks was demoted and then discharged from this position. He filed suit against Petitioners St. Mary's Honor Center and Steven Long, Superintendent of St. Mary's, alleging that Petitioners had demoted and discharged him on the basis of his race and in retaliation for his filing a complaint with the Equal Employment Opportunity

Commission, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The complaint also alleged that Petitioner Long had violated Hicks' rights under 42 U.S.C. §1983. Order and Memorandum of the District Court, Appendix to Petition for Writ of Certiorari ("Pet."), at pages A-14 to A-15, A-18.

In 1981, the Deputy Director of the Missouri Division of Corrections, in Jefferson City, Missouri, requested a statewide study of the correctional facilities that, *inter alia*, addressed the "organizational stability" of St. Mary's. Joint Appendix ("J.A.") at 68-70; 81-85. The study measured "shares of power" held by black and white supervisors [levels 2-6] and correctional officers (CO-1s) at St. Mary's, noting that at level 2, the custody sergeants, there were no whites:

6. W
5. B
4. W W B W W
3. B B B B B B B
2. B B B
1. B B B B B B B B B W B B B B B W B B B B B

J.A. 82-83. The study concluded that although the "executive positions are racially balanced (one White and one Black), because "the majority of the program staff (63.64%) is black ... the potential for subversion of the Superintendent's power — should the staff become racially polarized — is very real." J.A. 85. The Director and Deputy Director of the Division of Corrections discussed the report with management and circulated copies to Superintendents of the Centers. J.A. 70, 71, 73.

In late 1983, there were numerous complaints to the Division about the conditions and operations at St. Mary's. Pet. A-15. Among the complainants were two white correctional officers from St. Mary's who called and visited Jefferson City because "they wanted to make promotion, but

they said blacks were in the way, so they couldn't be promoted." Record ("R.") at page 1-21. After investigations, in January 1984 the Superintendent at St. Mary's was transferred and replaced by Petitioner Steven Long. Pet. A-15. John Powell, a white male, became the Chief of Custody, over the three Shift Commanders. Pet. A-15.

Supervisory personnel in the custody section of St. Mary's changed dramatically after Petitioner Long's appointment. During the four months between Long's arrival and Hicks' departure, the custody supervisors underwent the following transformation:

	Jan. 1984	April 1984
6. Superintendent	W - Schulte	W — Long
5. Asst. Superintendent	**B** - Banks	B - Banks
3. Chief of Custody	**B** - Greenlee	W — Powell
2. Shift Supervisor	**B** - Woodward	W — Hefele
" "	**B** - MacAvoy	W — Wilson
" "	**B** - Hicks	W

Pet. A-15, A-27; J.A. 56-57, 82.

The trial court found that when Long arrived in January 1984 there were 30 blacks employed, and when he left the facility in May, 1985 there were 29 blacks employed. R. 2-111. In the first year after Long and Powell took charge, twelve blacks were fired and one demoted, but only one white was terminated. R. 3-10 to 3-11.

The testimony revealed that while Long could effectively terminate employees, he did not control the hiring for level 1 CO-1s, the bulk of the positions. That was done pursuant to merit system lists by the central personnel office in Jefferson City:

QUESTION: You're the one that recommends the CO-1s?

> THE WITNESS: Not CO-1s. They come directly from Jefferson City. They have a central pool.

J.A. 67 (testimony of Vincent Banks).

The district court found that Hicks established a prima facie case, under *McDonnell Douglas*, 411 U.S. 792 (1973), by showing that he is a member of a protected class; that he met the job qualifications of a shift commander, as proven by his experience, satisfactory record, and ratings; that he suffered adverse actions in his demotion and termination; and that after his demotion, the position remained open and was then filled by a white male. Pet. A-22 to A-23.

The court found that the burden then shifted to the Petitioners to set forth a legitimate, non-discriminatory reason for the adverse employment decisions. Pet. A-23. Petitioners set forth two reasons for the adverse action: "the severity and the accumulation of violations committed by plaintiff." Pet. A-23. Long testified that the reasons for termination were:

> Mainly, an accumulation of the infractions by Mr. Hicks, of the problems that had been accounted (sic) to that point, without any appearance of any improvement in his conduct, and the seriousness of that individual incident.

R. 2-104.

In the six years before the arrival of Long and Powell, Hicks had not been suspended or disciplined, Pet. A-16, but was disciplined three times in March 1984: (i) for being the shift commander on duty when a front door officer was away from his post, for which he received a five day-suspension, Pet. A-15, A-16; (ii) for failing to correct the log of a subordinate's use of St. Mary's vehicle, for which he was

demoted to CO-1, Pet. A-17; and (iii) for allegedly failing to investigate a fight between inmates, for which he received a reprimand letter, Pet. A-18. Around April 11, 1984 Hicks filed an EEOC complaint complaining of racial discrimination in employment conditions. Amended Complaint, ¶ 10.

The district court compared the plaintiff's disciplinary violations with actions taken against others for similar or more serous violations. The court noted that the plaintiff was the only supervisor disciplined for violations committed by his subordinates, Pet. A-24, that far more serious infractions by other supervisors and CO-1s (many of whom where white) were punished far less severely, Pet. A-25. These included allowing guests with guns into the institution, allowing inmates to escape and allowing inmates access to personal files and the Center's power room, and were punished less severely, if at all. Pet. A-25 to A-26.

On April 19, 1984 Steven Long and John Powell met, in Assistant Superintendent Vincent Banks' office, with Hicks to inform him of his demotion to CO-1 status and reduction in his salary. Pet. A-18. Powell and Long assigned Hicks be a front door officer and informed him he would have to perform custodial duties. J.A. 43. Powell testified that custodial duties had never been assigned to a front door officer before. J.A. 43. After the meeting, Powell followed Hicks and heated words were exchanged. Hicks left without further incident. Pet. A-18.

At trial, Powell denied any personal difficulty with Melvin Hicks: "I can't say that there was difficulties between he and I. At no time was there any kind of personal --" J.A. 46. Although Powell also denied any instigating role in the confrontation with Hicks, J.A. 46, the district court stated that the evidence suggested that Powell had "manufactured the confrontation between plaintiff and himself in order to terminate plaintiff." Pet. A-26. Powell

wanted to take disciplinary action against Hicks for the incident. Pet. A-18. Hicks filed a second EEOC complaint on May 7, 1984, alleging demotion of the basis of race and amended it to add the discharge claim. Am. Comp. ¶ 15.

On May 9, 1984 a four person disciplinary review board, composed of two blacks, recommended a three day suspension of Hicks for the confrontation. Pet. A-18 to A-19. Petitioner Long testified that he looked at Sgt. Hicks' entire record and no questions were raised in his mind about the propriety of Mr. Hick's dismissal under those circumstances, [R. 2-155], although the disciplinary board, had recommended a far lesser sanction, R. 2-156. He "disregarded their vote and recommended termination." Pet. A-18 to A-19. Donald Wyrick, Director of the Division of Adult Institutions, approved the final discharge decision. R. 2-109.

The trial court concluded, based on its extensive comparison of the application and degree disciplinary practices at St. Mary's, that the reasons proffered by Petitioners were pretextual. Pet. A-23. However, after finding pretext by Petitioners, the court held that plaintiff nonetheless had to prove that race was the reason for the action against him. Pet. A-26. The court stated:

> It is clear that John Powell had placed plaintiff on the express track to termination, but that it is also clear that Powell received the aid of Ed Ratliff [white] and Steve Long in this endeavor. The question remains, however, whether plaintiff's race played a role in their campaign.

Pet. A-26. The court further noted that "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." Pet. A-27.

In reaching its final conclusion that Hicks had failed to prove by "direct evidence or inference that his unfair treatment was motivated by his race," Pet. A-29, the district court discounted the disproportionate firing of blacks at St. Mary's because it thought that Defendant Long had hired blacks also; the court noted that CO-1 blacks were not disciplined for violations occurring on plaintiff's shift, that blacks sat on the disciplinary review boards, that a large number of black supervisors were fired because nearly all the supervisors were black at the beginning of 1984, and that both Long and Powell testified that they did not know of the study regarding racial balance. Pet. A-27 to A-28.

The court entered judgment for St. Mary's Honor Center on Respondent's claim of race discrimination in violation of Title VII, Pet. A-29, and also entered judgment for Steve Long on the claim of racial discrimination under 42 U.S.C. §1983 for the same reasons, Pet. A-30. No mention was made in the findings about the judgment of plaintiff's claim of retaliation under Title VII.

On appeal, the Court of Appeals for the Eighth Circuit reversed, finding that once plaintiff proved a prima facie case and that the employer's articulated reasons were pretextual, plaintiff was entitled to judgment as a matter of law. Pet. A-12. The Court of Appeals did not address the question whether the district court's "assumption" of the unarticulated personal reason of animosity was proper, because it found that the that reason was never claimed by defendants. Pet. A-10. The appellate court did not review the findings of the trial court for clear error and did not rule on the issue of retaliation because it reversed the district court on the basis of plaintiff's disparate treatment theory. Pet. A-12, n.9:

> In this circuit, if the plaintiff has met his or her burden of proof at the pretext stage — that is, if the plaintiff has proven by a

> preponderance of the evidence that all of the defendant's proffered nondiscriminatory reasons are not true reasons for the adverse employment action — then the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required.

Pet. A-11. The court of appeals reversed the judgement of the district court on the merits of plaintiff's Title VII claim against St. Mary's, and the §1983 claim against Long. Pet. A-12.

The defendants, St. Mary's Honor Center and Steven Long, filed a petition for certiorari with the Supreme Court of the United States, this petition was granted and the case set for argument.

SUMMARY OF ARGUMENT

I.

The *McDonnell Douglas/Burdine* line of cases requires that judgment be entered for a Title VII plaintiff if the reasons articulated by the defendant as the "legitimate, nondiscriminatory" reasons for the disputed employment decision are proven to be false. This follows because upon the establishment of a prima facie case, prohibited discrimination is established as one of the possible reasons for the decision. All other possible reasons except the ones articulated and relied upon by the employer necessarily drop out of the case. Therefore, if the articulated reasons are demonstrated to be false and therefore pretextual, the only reason remaining in the case is prohibited discrimination.

II.

It is inconsistent with the purpose of the *McDonnell*

Douglas/Burdine line of cases to permit a defendant to rely on a reason not articulated as being the one for making the employment decision. A central purpose of the *McDonnell Douglas/Burdine* order of proof is to eliminate all reasons not relied on and to permit full exploration of the reasons articulated by the employer. A plaintiff is unable to do so if the trial court relies on a reason not advanced by the employer. Thus, the truth-seeking function of the inquiry is undermined.

III.

It is clear that a plaintiff may prove pretext *either* through direct evidence of discrimination *or* by demonstrating that the articulated reasons are in fact not the real reasons. The adoption of the "pretext-plus" rule advanced by Petitioners would, in effect, require that plaintiffs adduce direct evidence of racist motivation in order to prevail. Such a result is directly contrary to the unanimous decisions of this Court in the *McDonnell Douglas/Burdine* line of decisions.

IV.

The district court erred as a matter of law in holding that additional evidence proved that racial discrimination was not a motivating factor in the discharge of Respondent. These errors required the reversal of the decision of the district court.

ARGUMENT

Our nation's commitment to enforcing fully Title VII, 42 U.S.C. § 2000e *et seq.*, and other anti-discrimination laws has required the courts and Congress to address the difficulties of proving subtle, as well as blatant, cases of

discrimination.[1] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Justice Powell, wrote for a unanimous Court, setting forth rules that would govern the order of proof and the allocation of the evidentiary burdens in cases alleging intentional discrimination. This Court further explained the *McDonnell Douglas* inquiry, again in a unanimous opinion, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Under the *McDonnell Douglas* inquiry, the plaintiff carries the initial burden of proving, by a preponderance of the evidence, a prima facie case of the forbidden discrimination. The prima facie requirements vary depending on the factual situation and the adverse action at issue, for example, in a failure to hire case a plaintiff would

[1]Some cases of intentional discrimination can be proved by direct evidence of discrimination, *e.g., Teamsters v. United States*, 431 U.S. 324 (1977), but, in most cases only indirect evidence will be available. Because Title VII prohibits all forbidden discrimination, not only in cases where there is a "smoking gun," standards that guide the courts' evaluation of indirect proof of discrimination are crucial. For example,

> Age discrimination may be subtle and even unconscious. Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up. The indirect method [of proof] compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation.

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988), *quoting La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants, (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S., at 802.[2] Proof of a prima facie case establishes a legally mandatory, rebuttable presumption, which, if the defendant remains silent, requires judgment for the plaintiff. *Burdine*, 450 U.S., at 254 n.7.

Next, if the plaintiff succeeds in proving the prima facie case, the burden must shift to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S., at 802. This is a burden of production, under which "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S., at 254-55. Although the reasons need not be proved by a preponderance of evidence at this stage, they must be legally sufficient to justify a judgment for the defendant. *Id.* 450 U.S., at 255. Meeting this burden

> serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate

[2]The facts required to make out a prima facie case will necessarily vary in Title VII cases. *Burdine*, 450 U.S., at 253 n.6. Thus, in this discharge case, the district court found that Respondent had proven that (i) he was a member of a protected class, (ii) met the qualifications for his job, (iii) was nonetheless demoted and discharged, and (iv) the position remained open after his demotion and was then filled by a white male. Pet. App. A-22 to -23.

> reason for the action *and* to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 255-56 (emphasis added). The defendant's evidence must serve these two functions in order to be sufficient to discharge its burden and to rebut the presumption of discrimination. *Id.*, at 256.

Finally, if the defendant meets its burden of production, the burden shifts back to the plaintiff. In *Burdine*, this Court explained the plaintiff's ultimate burden of persuasion in a single paragraph that concluded its discussion of the three-part test:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now *merges* with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this *either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S., at 804-05.

Burdine, 450 U.S. at 256 (emphasis added). The interpretation of this paragraph lies at the heart of the controversy of this case.

I. A TITLE VII PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IF HE PROVES THAT EVERY NON-DISCRIMINATORY REASON PROFFERED BY THE DEFENDANT WAS NOT CREDIBLE.

After a plaintiff has proven a prima facie case and a defendant proffers its reason for the allegedly discriminatory action, a plaintiff under *McDonnell Douglas* "may succeed ... by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S., at 256. The court of appeals held, correctly in Respondent's view, that a plaintiff is entitled to judgment if he or she convinces the court -- as concededly occurred here -- that all of the employer's proffered explanations were unworthy of credence. Pet. App. A-26. Petitioners contend, on the other hand, that a plaintiff must do far more. A Title VII plaintiff is not entitled to judgment, Petitioners urge, unless the plaintiff "eliminate[s] *all* lawful reasons for the employment decision." Brief for the Petitioners ("Pet. Br.") at 16 (emphasis added).

A. By Process of Elimination, *McDonnell Douglas* Narrows the Factual Issues to Determine Whether There was Discrimination.

Petitioners' argument that a plaintiff must eliminate *all* conceivable legitimate explanations is inconsistent with the fundamental methodology of *McDonnell Douglas* and its progeny. *McDonnell Douglas* does not contemplate that the evidence or findings of fact and conclusions of law in a Title VII case must canvas all, or even most, conceivable explanations for a disputed employment practice. Rather, the serial ordering and allocation of burdens in *McDonnell Douglas* "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S., at 354 n.8.

The three-part *McDonnell Douglas* inquiry is structured as a process of elimination. As then-Justice Rehnquist explained in *Furnco Construction Corp. v. Waters*, 438 US. 567 (1978), the primary principle guiding the inquiry is to evaluate evidence "in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S., at 577. The *Furnco* Court explained the fundamental methodology of the *McDonnell* model of indirect proof:

> more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Furnco, 438 U.S., at 577. Against this understanding, each step of the inquiry is designed to present the litigants and fact finder with questions that progressively narrow all possible reasons for the employer's action until the "real" reason is revealed. These presumptions, burdens, and inferences "reflect judicial evaluations of probabilities and ... conform with a party's superior access to the proof." *Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) (citations omitted). If, at the end of the three-step inquiry, no nondiscriminatory reason remains, the necessary inference is that invidious discrimination was in reality the motive for the disputed action.

The first step of *McDonnell Douglas* requires the plaintiff, in order to proceed further, to prove a prima facie case. This "serves a important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S., at 253-54.

Those reasons are (i) that there was no job vacancy, and (ii) that the plaintiff was absolutely or relatively unqualified. *Teamsters*, 431 U.S., at 358 n.44. Those facts, coupled with the additional prima facie evidence that the plaintiff was a member of a protected class and was bypassed or replaced by a person not from that class, creates a presumption of discrimination. Discrimination is presumed because "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S., at 577.

Once a plaintiff has established a prima facie case, the focus of the judicial inquiry, and the proof required of each party, narrows. The inquiry now focuses on the particular explanations that the employer itself chose to proffer through admissible evidence. Placing the burden on the employer reflects the ability and motivation of the employer to identify any legitimate, nondiscriminatory explanations for which there may be substantial evidentiary support:

> [T]he employer [i]s in the best position to show why any individual employee was denied an employment opportunity.... [In some instances] the company's records [are] the most relevant items of proof. If the [disputed action] was based on other factors, the employer and its agents kn[o]w best what those factors were and the extent to which they influenced the decisionmaking process.

Teamsters, 431 U.S., at 359 n.45. The litigation decision of the employer to place in controversy only those particular explanations eliminates from further consideration the alternative explanations that the employer chose not to advance. These discarded reasons must now be presumed not to be possible reasons in fact for the challenged action.

McDonnell Douglas is deliberately framed to assure that the list of possible explanations to be addressed at trial is winnowed down; the defendant cannot put a possible explanation into issue merely by mentioning it in a pleading or a brief, but must specifically frame the proffered reason and support it with admissible evidence. *Burdine*, 450 U.S., at 255. These requirements would be meaningless if plaintiffs and courts were obligated to consider "all" possible reasons or any of a myriad of explanations that a defendant itself chooses not to proffer. The potentially infinite inquiry suggested by Petitioners would be impossible for any plaintiff to complete, and unwieldy for any court to assess. The discovery necessary merely to attempt to disprove "all" possible reasons would be boundless.

"The factual inquiry proceeds to a new level of specificity" once the employer discharges its burden of articulating a particular reason or reasons for its actions. *Burdine*, 450 U.S., at 255. The litigation then focuses exclusively on the specific reasons proffered by the employer.

At this point, the issue before the court is narrow, albeit at times difficult: "In short, the district court must decide which *party's* explanation of the employer's motivation it believes." *United Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (emphasis added).

At the final step of the *McDonnell Douglas* inquiry the plaintiff must address the employer's articulated reasons for the challenged action. *Burdine* quite clearly explains how this task "merges with" the plaintiff's ultimate burden of persuasion to allow two courses of action, which it states in the disjunctive. *Burdine*, 450 U.S., at 255. The plaintiff may *either* prove that discrimination was more likely than the articulated reasons to have been the employer's real motivation, *or* prove simply that those stated reasons were not in fact the employer's motivations. The latter option,

proof that the stated reasons are not credible, proves by inference that discrimination was the reason, since all possible nondiscriminatory reasons have been eliminated from the case either because they were not articulated by defendant or because they were proved to be false. No reasons remain but the discrimination that we infer from our common experience. *See Furnco*, 438 U.S., at 577. That factual finding discharges the ultimate burden of persuasion and compels a judgment for the plaintiff.[3] Additional proof of discrimination, direct or indirect, would be redundant.

In this case, Petitioners concede, the district court proceeded to reject as not truthful the explanations they proffered at trial. Pet. Br. 11, 17, 26; Pet. App. A-26. Having eliminated the only lawful reasons properly before the court under *McDonnell Douglas*, Respondent was under no obligation to go further and address "all," or any, other conceivable explanations that Petitioners had chosen not to assert. Having eliminated the only non-discriminatory explanation in issue, respondent was entitled to a judgment that the only remaining motive at issue -- racial discrimination -- had been established.

The following diagram illustrates the narrowing of issues in a case, like this one, in which a plaintiff proves a prima facie case which is met by articulated reasons by the employer, which are then proved to be unworthy of credence.

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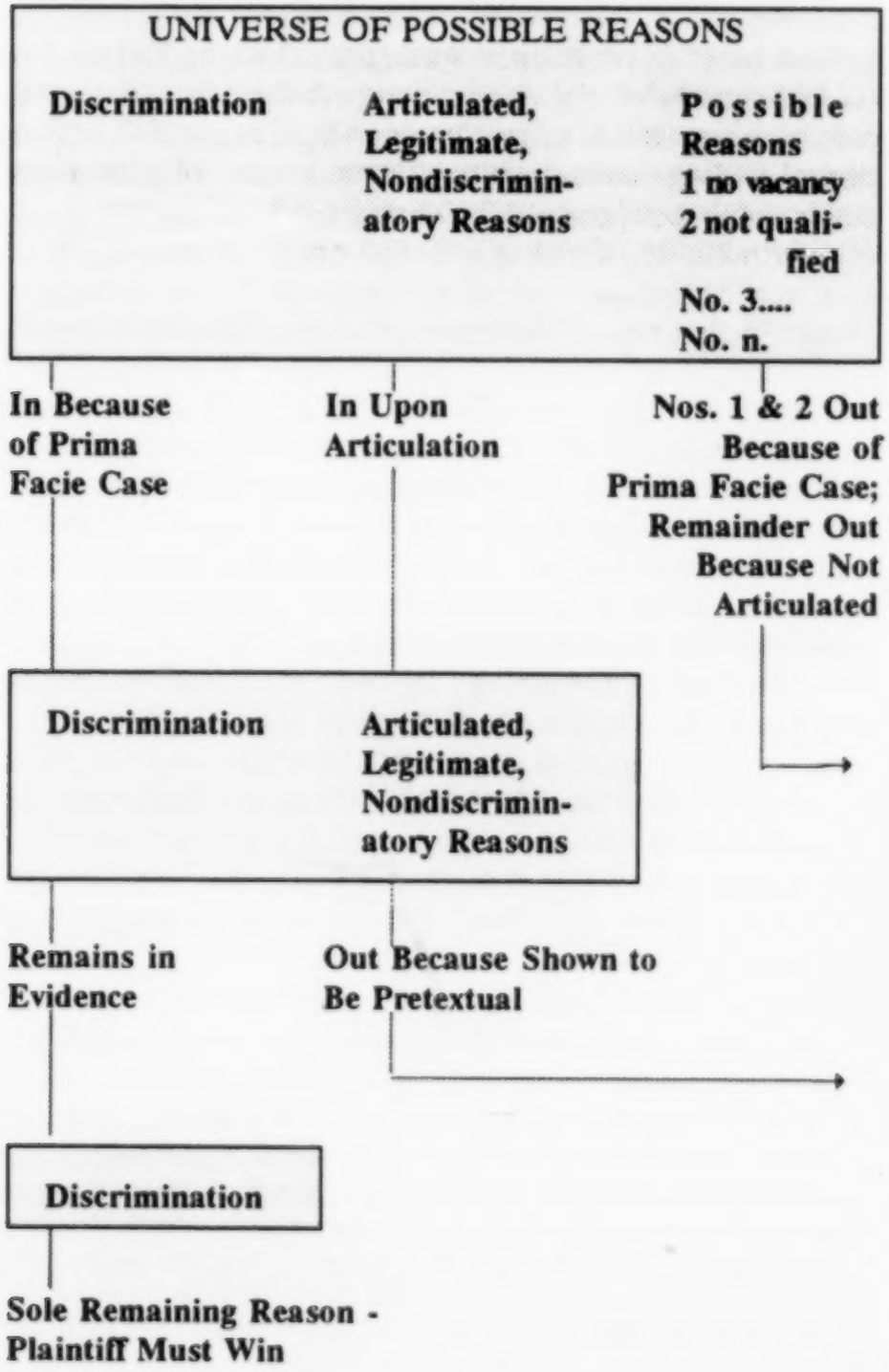
[3]Petitioner's semantic argument that proof of "pretext" must instead mean proof of "pretext *for* discrimination" confuses separate analytical steps: The plaintiff's evidentiary burden is to prove only that the articulated reasons were not the employer's true reasons; the consequence of so doing creates the inference that discrimination was the reason.

MODEL OF PROOF FOR CASE WHERE ARTICULATED REASONS ARE PROVEN FALSE



B. Allowing a Plaintiff Who Proves Only a Prima Facie Case Against a Silent Defendant to be in Better Position than a Plaintiff Who Proves a Prima Facie Case And Rebuts all Proffered Reasons of a Dishonest Defendant is Illogical.

Petitioners' assertion that an employee is not entitled to judgment unless he or she eliminates *all* possible legitimate explanations is inconsistent with *McDonnell Douglas*' holding that an unrebutted prima facie case requires the entry of judgment for the plaintiff.

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of that presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, 450 U.S. at 254.

In the circumstances described by *Burdine,* the plaintiff clearly has not -- as petitioners argue a plaintiff must -- eliminated all *possible* legitimate reasons for the disputed action. On the contrary, the prima facie case only "eliminates the two most common nondiscriminatory reasons for the action." *Burdine,* 450 U.S. at 254. The theoretical possibility that some nondiscriminatory reason underlies the conduct at issue is not sufficient to create an issue of fact, or prevent entry of judgment for plaintiff, since mere speculation as to the existence of some legitimate explanation is not sufficient to overcome the weight of the evidence creating the prima facie case. *See Bazemore v. Friday,* 478 U.S. 385, 403 n.14 (1986); *Patton v. Mississippi,* 332 U.S. 463, 466-468 (1947). A "possible" legitimate

explanation is sufficient to create an issue of fact only if and when it is set forth by the defendant through the introduction of admissible evidence.

When an employer does articulate, through evidence, a particular non-discriminatory reason, it creates an issue of fact with regard to *that* proffered reason. But the articulation and substantiation of one such reason does not create an issue of fact with regard to all, or any, of the other conceivable reasons. If the petitioners in this case had offered no defense whatever, the district court could not have ruled for petitioners on the theory, for example, that respondent had failed to prove he was not dismissed for chronic absenteeism.

In the instant case, petitioners, as contemplated by *McDonnell Douglas,* articulated through admissible evidence two specific alleged legitimate motives -- the severity and accumulation of disciplinary infractions. As to each but only as to these there was undeniably an issue of fact. These proffered reasons were the primary focus of the trial, and the district judge decided in favor of respondent with regard to both of those factual issues, holding that neither of the articulated reasons was the actual basis for respondent's dismissal. But, once the district court had rejected the two proffered reasons the case returned to a similar evidentiary posture to where it was before the petitioners offered any explanation of their conduct.[4] Indeed, the position of

[4] Of course the original presumption legally mandated by the creation of the prima facie case under *McDonnell Douglas* was discharged when the petitioners met the burden of production. See FED. R. EVID. 301. However, the evidence which gave rise to the original prima facie case *remained in the record* unrebutted. The inference that evidence generated continued to be that employers are likely to act for *some* reason, and absent any legitimate reason, it is more likely than not that the basis of the decision was impermissible discrimination. *Furnco,* 438 U.S. at 577.

respondent following the trial was even better than would have been the case had the petitioners merely remained silent, because the district judge had affirmatively rejected two possible explanations. As Petitioners candidly concede, the unsuccessful proffer of "a phony reason" provides support for an inference "that the employer is trying to conceal a discriminatory reason for his action." Pet.Br. 15 n.3.

A defendant which unsuccessfully offers a "phony reason" logically cannot be in a better legal position that a defendant who remains silent, and offers no reasons at all for its conduct. In both situations there is no articulated non-discriminatory reason to explain away the evidence and inference offered by plaintiffs. The theoretical possibility, present in both situations, that there is some unarticulated legitimate reason is not by itself sufficient to create an issue of fact.

C. It is Well-Established that Rebuttal of the Articulated Reasons Serves to Discharge the Plaintiff's Ultimate Burden of Proof of Discrimination.

Petitioners' argument that a plaintiff must eliminate all legitimate reasons for a disputed employment action squarely contradicts the entire line of *McDonnell Douglas* cases, which require a plaintiff only to discredit the employer's proffered explanation. In *Aikens*, a more recent application of *McDonnell Douglas*, all members of the Court agreed that it was error to require that the plaintiff submit direct evidence of discriminatory intent. *Aikens*, 460 U.S., at 714 n.3, 717. The *Aikens* Court reaffirmed that plaintiff discharges of his ultimate burden of persuasion by either of two choices: proving directly that a discriminatory reason more likely motivated the employer "'or indirectly by showing that the employer's proffered explanation is

unworthy of credence.'" *Id.*, at 716, *quoting Burdine*, 450 U.S., at 256. *See also Aikens*, 460 U.S., at 717, 718 (Blackmun, J., concurring) ("the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision.")

Recently, in *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989), the Court again affirmed the plaintiff's right to demonstrate that the employer's proffered reasons for its decision "were not its true reasons." The *Patterson* Court found too narrow the district court's instruction that plaintiff could carry her burden of persuasion only by showing that she was better qualified than the while applicant who got the job; the majority held that the plaintiff "may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual." *Id.*, 491 U.S., at 188. *See also Price Waterhouse v. Hopkins*, 490 U.S. 490, 247 n.12 (1989) (plurality opinion by Brennan, J.) (noting that a plaintiff may prevail under *Burdine* if she proves "that the employer's stated reason for its decision is pretextual); *Id.*, 490 U.S., at 261 (1989) (O'Connor, J., concurring) (distinguishing mixed-motive cases as "a supplement to the careful framework established by our unanimous decisions" in *McDonnell Douglas* and *Burdine*); *Id.*, 490 U.S., at 287 (Kennedy, J., dissenting) (emphasis in original) (restating the *Burdine* test that "a plaintiff may succeed in meeting her ultimate burden of persuasion '*either* directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'"). And -- notwithstanding the recent decisions of the few circuits relied on by Petitioner -- the overwhelming majority of the courts of appeals agree with the court below that *McDonnell Douglas* dictates entry of judgment for the plaintiff upon proof that all of the employer's articulated reasons are a

unworthy of credence.[5]

The Equal Employment Opportunity Commission, the agency responsible for enforcement of Title VII, last year also explicitly reaffirmed the *McDonnell Douglas* model of indirect proof. *See* Recent Developments in Disparate Treatment Theory, EEOC Advance Policy Guidance N 915.002 (approved by 4-0 vote July 7, 1992), Lab. L. Rep. (CCH) 449 Issue No. 493, Part 2 (July 20, 1992). The

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[5]*See, e.g., King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985) ("*Burdine* makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendant's rebuttal should prevail."); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir.), *cert. denied*, ___ U.S. ___, 116 L.Ed.2d 185 (1991) (explaining that to show "pretext, a plaintiff need not directly prove discriminatory intent. It is enough for the plaintiff to show that the articulated reasons were not the true reasons for the defendant's actions"); *Ibrahim v. New York State Dep't of Health*, 904 F.2d 161, 168 (2d Cir. 1990) (demonstrating that defendant's proffered explanation was not the true reason for its decision meets plaintiff's ultimate burden of persuasion); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1000 (3rd Cir. 1988) ("A showing that a proffered justification is pretextual is itself equivalent to finding that the employer intentionally discriminated."); *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 639-40 (5th Cir. 1985) (disproving the proffered reasons "recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, we presume that the employer was motivated by discriminatory reasons"; "Thus, in our view, unlike Humpty Dumpty, the employee's prima facie case can be put back together, through proof that the employer's proffered reasons are pretextual"); *MacDissi v. Balmont Industries*, 856 F.2d 1054, 1059 (8th Cir. 1988) (once fact finder is persuaded that proffered reason is not true reason, proof of intentional discrimination "unjustifiably multiplies the plaintiff's burden"); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1554 (11th Cir. 1990) (proving the proffered reason is not worthy of belief "satisfies the required ultimate burden of demonstrating by a preponderance of the evidence that he or she has been the victim of intentional racial discrimination").

EEOC found the command of *Aikens* and *Burdine* "clear": "a plaintiff can prevail *either* by proving that discrimination more likely motivated the decision *or* that the employer's articulated reason is unworthy of belief." *Id.*, at 4 n.5 (emphasis in original). It concluded:

> Thus the Commission disagrees with those courts that have held that this is not enough to prevail for a plaintiff to disprove the employer's articulated reason. *See, e.g., Galbraith v. Northern Telecom*, 944 F.2d 275, 282-83 (6th Cir. 1991); ... *Mesnick v. General Electric*, 950 F.2d 816, 824 (1st Cir. 1991) ....

Ibid.

Congress has not altered the *McDonnell Douglas-Burdine* test and its widespread use in the court of appeals. This silence, in light of its recent and extensive amendments of the burdens of proof and persuasion in other types of Title VII claims, suggests its approval of this method of indirect proof of Title VII claims. *See, e.g.*, The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1074, 1074-75 (overruling *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), with respect to the burden of proof in disparate impact cases); *Id.* § 107, 105 Stat., at 1075-76 (overruling *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), regarding proof and remedies in mixed motive cases).

D. The Court of Appeals Correctly Followed *McDonnell Douglas* in Holding that Respondent's Rebuttal of the Petitioner's Reasons Entitled Him to Judgment.

The Court of Appeals for the Eighth Circuit correctly applied the *McDonnell Douglas* analysis to this case. Pet. App. A-1 to -12. The court accepted the district court's findings, which are undisputed here, that Respondent had

proved a prima facie case of discrimination in his demotion and termination, that the Petitioners had articulated only two reasons for their actions, and that Respondent had proved by a preponderance of the evidence that both of those reasons were not credible. Pet. App. A-8.

However, rather than concluding its inquiry, the district court added speculations of its own, suggesting that although Respondent had proven the existence of a crusade to terminate him "he has not proven that the crusade was racially rather than personally motivated." Pet. App. A-27. The court of appeals found that the district court's "assumption" of a motivation was never claimed by defendants. Pet. App. A-10. Following *McDonnell Douglas*, the court below correctly held that the *defendant* must introduce evidence to clearly frame its reasons for the plaintiff's rejection. *Ibid.* Following *Furnco* and *Burdine*, the court then properly held that since the Respondent met his burden of rebutting all of the defendants' proffered reasons, as a matter of law he "satisfied his ... ultimate burden of persuasion. No additional proof of discrimination is required." Pet. App. A-11.

II. CREDITING UNARTICULATED REASONS DEPRIVES A PLAINTIFF OF HIS FULL AND FAIR OPPORTUNITY TO PROVE HIS CASE.

A. *McDonnell Douglas* Requires the Employer to Frame Clearly the Factual Issues so the Plaintiff Has a Full and Fair Opportunity for Rebuttal.

A plaintiff would not in any meaningful sense be accorded "his day in court" if he does not know what explanations by his employer he must disprove at trial. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985). Fundamental fairness demands that the plaintiff have

sufficient notice to develop and present evidence, and effectively examine witnesses at trial.[6]

The *McDonnell Douglas* inquiry safeguards both parties opportunity to respond to relevant issues by requiring each party to frame the facts. In order to discharge satisfactorily its burden of production under *McDonnell Douglas*, the employer must "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S., at 255-56. *See also Aikens*, 460 U.S. at 716 n.5 (*quoting Burdine*, 450 U.S. at 256) (cautioning that "[o]f course, the plaintiff must have an adequate 'opportunity to demonstrate that the proffered reason was not the true reason...'"); *Patterson*, 491 U.S., at 187 ("Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons.")

The clarity of the proffered reasons is sharpened by the additional requirement that, to be legally sufficient, the employer's explanations must be admitted into evidence; "the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." *Burdine*, 450 U.S., at 255 n.9. Insofar as the relevant question is what motivated the employer at the time of the action, there is no reason to allow employers, after trial, to have a second bite at the apple.

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[6]*Cf. Lankford v. Idaho*, 500 U.S. ___, 114 L.Ed.2d 173 (1991) (holding that capital defendant, in preparing for sentencing hearing, did not have the notice required by due process that the judge might sentence him to death based on facts in the trial record, when the state had responded in the negative to the court's earlier order requiring it to reveal whether it would seek death).

The denial of an opportunity to rebut an explanation is even more egregious when the explanation is first "proffered" in the decision of the district court. In *Lanphear v. Prokop*, 703 F.2d 1311 (D.C. Cir. 1983), the court of appeals reviewed a decision in which the district court had granted judgement for the defendant on a ground completely different from that which the employer claimed. Finding that the defendant's omission of this reason failed to meet the notice requirement of *Burdine*, Judge Wilkey, writing for an unanimous court, held: "It should not be necessary to add that the defendant cannot meet its burden by means of a justification articulated for the first time in the district court's opinion." *Id.*, 703 F.2d, at 1317 & n.39.[7]

Judge Wilkey summed up the fundamental flaw of the district court's sua-sponte defense:

> The district court's substitution of a reason of its own devising for that proffered by appellees runs directly counter to the shifting allocation of burdens worked out by the Supreme Court in *McDonnell Douglas* and *Burdine*. The purpose of that allocation is to

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[7]*Lanphear*'s reasoning that a non-articulated reason cannot meet the defendant's step two burden is analytically consistent with the presumption of discrimination that governs cases in which a defendant articulated no reasons at all. In *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir. 1984), the defendant had never articulated reasons for its failure to promote plaintiff, despite its argument on appeal that such reasons could be found in plaintiff's witnesses' testimony. The court of appeals found that even though it was *possible* that these facts could be legitimate reasons, the "difficulty" in this case was that "the defendant never articulated to the magistrate that these *were in fact* the reasons for the particular challenged action." *Id.*, 738 F.2d, at 1429 (emphasis in original). The court affirmed the district court's finding of discrimination because the defendant had failed to rebut plaintiff's prima facie case. *Id.* at 1430-31.

> focus the issues and provide plaintiff with 'a full and fair opportunity' to attack the defendant's purported justification. That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether.

Lanphear, 703 F.2d, at 1316.

Other courts of appeals have recognized that *McDonnell Douglas* precludes trial judges from crediting speculative explanations never offered by a defendant. *See, e.g., Equal Employment Opportunity Comm'n v. West Bros. Dept. Store*, 805 F.2d 1171, 1172 (5th Cir. 1986) ("The trial court may not assume this task [of articulating a legitimate reason]; '[i]t is beyond the province of a trial or a reviewing court to determine -- after the fact -- that certain facts in the record might have served as the basis for an employer's personnel decision'.... We are concerned with what an employer's actual motive was; hypothetical or *post hoc* theories really have no place in a Title VII suit.")(*quoting Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1430 (5th Cir. 1984)); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 376 (6th Cir. 1984) (Trial court's "finding" of an instance of plaintiff's poor judgment was irrelevant, "since defendant never claimed that the incident was a reason for failing to promote plaintiff");

B. Allowing the Defendant to Benefit from Unarticulated Reasons by Escaping Scrutiny for Pretext is Detrimental to Truth-Seeking and Efficiency.

The clear articulation of an employer's reasons, in rebuttal to a plaintiff's prima facie case, helps narrow the focus of the litigation. The burden-shifting process will flush out, on plaintiff's rebuttal, relevant evidence about the proffered reasons and best reveal whether a given answer is

true.[8] Unarticulated reasons that are allowed to remain hidden from the harsh light of this adversarial process should not be given evidentiary weight. *See* Marina Szteinbok, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims after* Aikens, 88 COLUM. L. REV. 1114, 1130-32 (1988) (allowing defendants to prevail on unarticulated reasons "would distort the truth seeking process by failing to test factual premises adversarially.")

In addition, crediting only those legitimate nondiscriminatory reasons timely and clearly articulated -- and discrediting all others -- acknowledges the superior knowledge of the employer. The employer is in full control of the knowledge and evidence of its actions. *See Teamsters*, 431 U.S., at 359 n.45. A judicial process unrelated to an employer's actual proffered explanations has none of the indicia of reliability accorded to normal, adversarial proceedings. Given the court's customary reliance on a litigant to select the interpretation of the facts most favorable to his own case, to allow a fact finder to ascribe to the employer reasons it did not articulate would jeopardize the truth-seeking functions.

Respondent agrees that "Title VII does not compel every employer to have good reasons for its deeds,"[9] but surely Title VII compels every employer to articulate what those reasons are. "Ferreting out this kind of invidious discrimination is a great, if not compelling, governmental

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[8]"No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J.)

[9]Pet. Br. at 21, *quoting Benzies v. Illinois Dept. of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

interest," and it is reasonable and logical to place the burden of articulating reasons for hiring decisions on defendant employers. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (unanimously holding that the EEOC may subpoena peer review materials from a university in spite of its common law, evidentiary, and First Amendment objections).[10]

Petitioners present a litany of reasons that Title VII defendants might prefer not to articulate. Pet. Br. at 18. What Petitioners fail to provide is any explanation of why an employer should be exempted from articulating those reasons, however embarrassing or inconvenient, as *McDonnell Douglas* requires. If employers could withhold knowingly their real reasons with no fear of consequence, even if a plaintiff proved its proffered reasons to be pretextual, then the truth-seeking inquiry would cease to have any meaning.[11] This rule would create incentives that are directly counter to the truth-seeking process.

Basic principles of evidence and common law waiver support a policy of disallowing belated reasons. The defendant is the master of his case and controls the evidence relating to the real reasons for its actions. It fairly bears the responsibility for its choices and the risk that plaintiff will disprove any pretextual reasons and therefore prevail. Where an employer deliberately chooses, for whatever tactical or other reason, not to advance some additional plausible justification for its actions, that waiver is binding on the employer and court alike. *See, e.g., Nation-wide Check v. Forest Hills Distribs.*, 692 F.2d 214, 217 (1st Cir.

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[10]Tactics less draconian than silence, such as protective orders, may ameliorate employers' concerns. *See* FED. R. CIV. P. 26(c).

[11]Deliberately misleading the court with sham testimony in order to meet the burden of production could, of course, risk other penalties. *E.g.*, 42 U.S.C. § 1621 (perjury).

1982) (*quoting* Wigmore on Evidence § 291, at 228 (Chadbourn rev. 1979) that non-production of a relevant document "'is evidence *from which alone* its contents may be inferred to be unfavorable to the possessor'"). *See also Michigan v. Lucas*, 500 U.S. ___, 114 L.Ed.2d 205 (1991) (statute requiring a rape defendant to file written notice and an offer of proof regarding a prior relationship with alleged victim within ten days of arraignment or risk possible preclusion of that evidence did not *per se* violate the Sixth Amendment, and might serve legislative ends, increase evidence, and enhance fairness).

Finally, articulation of reasons by the employer reduces the number of issues for the parties and fact finder, which conserves resources while focusing the parties on the most relevant issues. Petitioner argues that, in addition to proof of pretext, it is the plaintiff's burden to "prove the absence of any other justification supported by the record." Pet. Br. 16. Petitioner would allow -- indeed, oblige -- the finder of fact to consider not only the defendant's articulated reasons for its action and the plaintiff's allegation of a discrimination, but also to consider and reject all conceivable reasons that could have motivated the employer.

Petitioners' approach would squander judicial resources. All factual issues, even if vehemently denied by all parties, would remain in play. The plaintiff and fact-finder would have to assume responsibility for extracting from the record and resolving every conceivable reason for the action. The courts would be plunged standardless into a sea of defenses where every possible motivation and every shred of indirect and direct evidence might matter, multiplying litigation. This would be particularly ill-advised just as Congress has provided a right to jury trials in Title VII, *see* Civil Rights Act of 1991, Pub. L. 102-166 § 102(c),

105 Stat. 1073.[12]

C. The Confusion of the Present Record Demonstrates Why Crediting Unarticulated Reasons Undermines the Truth-Seeking Function of the Adversarial Process.

The central factual question of this litigation is one that Petitioners, three years after trial, still have not answered: What in fact was the reason that Steve Long and St. Mary's Honor Center demoted and fired Melvin Hicks? If Petitioners' answer is that personal animosity of John Powell was the reason, then Mr. Long and other defense witnesses gave false testimony at the trial, yet now seek the additional reward of escape from the judgment below. If Petitioners' answer is not John Powell's personal animosity, then Petitioners' factual basis for defeating the inference of discrimination dissolves.

The confusion in the factual record on which this petition rests — illustrates the danger of bypassing *McDonnell Douglas*' requirement of producing sufficient notice of the employer's reasons for its actions. Had the reason found by the district court been timely articulated by Petitioners, there is no doubt that the trial below would have been completely different.

The district court found that:

> It is clear that John Powell had placed plaintiff on the express track to termination. It is also clear that Powell received the aid of Ed Ratliff and Steve Long in this endeavor. The question remains, however, whether

[12]One can imagine the chaos if each juror, each on the basis of a *different* speculative reason, found for a defendant.

> plaintiff's race played a role in their campaign.

Pet. App. A-26. Of course, the question that the district court posed probably would have been answered during the trial had the Petitioners ever expressed that Powell's personal animosity or his endeavors against the plaintiff were the reason for their actions.

However, Respondent had no notice that Petitioners, much less the trial judge, might suggest that *personal*, rather than *racial*, animosity motivated them.[13] Certainly the testimony would not suggest that Petitioners would defend the charges on that ground. John Powell flatly denied any personal difficulty with Melvin Hicks: "I can't say that there was difficulties between he and I. At no time was there any kind of personal --" J.A. 46.

More importantly, Petitioners never claimed that any *decisionmaker* had personal animus or took Powell's purported animosity into account in demoting or discharging the Respondent. Vincent Banks, a member of the disciplinary committee that had recommended suspension when Respondent was terminated, did not mention any animus of Powell, himself, or the other committee members. Tr. 3-2 to 3-51. Similarly, Petitioner Long did not mention any animosity by Powell -- or himself -- towards Respondent,

[13]With proper notice, Respondent could have examined whether the "crusade" that the district court found against Hicks was "racially rather than personally motivated," Pet. A-27, and could have explored the extent to which the personal animosity was related to Respondent's race. With fair notice and opportunity to prove his case, Respondent could have investigated the actions of Powell and the actions and motivations of other white men who the court found assisted him -- Ed Ratliff and Petitioner Long. Respondent could have discovered whether other "crusades" were carried on against other supervisors and officers at St. Mary's.

and claimed that Respondents' history of infractions motivated him, a reason found incredible by the district court.[14]

Five months after trial, Respondents' counsel, Gary Gardner, summarized defendants' position consistent with their trial testimony. Defendants' Proposed Findings of Fact and Conclusions of Law (Nov. 30, 1989). Not one of the 41 proposed findings or conclusions allege that any of the defendants harbored personal animus toward Mr. Hicks. *Id.*, 1-13.[15] Similarly, in the court of appeals, Petitioners reported that *they* had "adduced evidence of legitimate, non-discriminatory reasons for Hick's demotion and discharge,

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[14]The Director of the Division of Adult Institutions, Donald Wyrick, who would make the final discharge decision, did not testify at all.

[15]The proposed conclusions regarding defendants' burden read in full:

> "Defendants produced evidence, however, of legitimate and nondiscriminatory reason [sic] for each of their employment decisions, the shift change, suspension, demotion and dismissal. The shift change was ordered to broaden the experience of plaintiff, the suspension was order as a result of plaintiff's not performing his duties as shift commander on March 3, 1984, to have the front officer at this post, to have the roving patrol officer make periodic reports, and to keep the visiting areas lights on. The demotion was order as a result of plaintiff not ensuring on March 17, 1984 that the use of a state vehicle, and the purpose of its use, was logged in the vehicle control and shift chronological logs. The dismissal was ordered as a result of plaintiff offering violence to his commanding officer on April 27, 1984, by inviting him to step outside. Though plaintiff denied such an offer, the encounter between plaintiff and his commanding officer was witnessed by a third employee, who testified that plaintiff used words to that effect." Defendants' Proposed Findings of Fact and Conclusions of Law, 14-15 (Nov. 30, 1989).

which were the severity and accumulation of violations of institutional rules," while they stated that the *trial court* had found John Powell's personal animosity. *Hicks v. St. Mary's Honor Center*, 91-1571, Brief of Appellees 3, 15 (Aug. 16, 1991).

In light of the fact that Long, Banks and Wyrick, made the critical decision, and all of their claimed reasons for the actions at issue were found to be pretextual, it is difficult to understand how petitioner can be exonerated on the assumption that Powell had a grudge against Respondent. Respondent, of course, had no notice that the relationship of Powell to these decisionmakers would be at issue.

In any event, Powell's personal animosity, otherwise unexplained, is not mutually exclusive of racial discrimination. Indeed, courts recognize that it is often the very expression of discriminatory motive. *Cf. Miles v. M.N.C. Corp.*, 750 F.2d 867, 871-72 (5th Cir. 1985) ("subjective evaluations involving white supervisors provide a ready mechanism for racial discrimination. This is because the supervisor is left free to indulge a preference, if he has one, for one race of workers over another").[16]

This undeveloped record turns the factual inquiry of *McDonnell Douglas* on its head: Petitioners themselves lead the rebuttal of the reason ascribed to them by the district court. This vague, post-hoc reason cannot, as a matter of law, serve to rebut Respondent's prima facie case evidence

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[16]The court of appeals did question "whether such a hypothetical reason based upon *personal* motivation even could be stated and still be 'legitimate' and 'nondiscriminatory.'" Because the court of appeals found that defendants did not meet *Burdine*'s requirement of a clear articulation with regard to this reason, it found no reason to resolve this question. A-10.

of discrimination.[17]

III. ADOPTION OF THE "PRETEXT PLUS" RULE WOULD REQUIRE DIRECT PROOF OF DISCRIMINATORY MOTIVE.

At the heart of the *McDonnell Douglas/Burdine* model is the principle that intentional discrimination can be established indirectly through circumstantial evidence, and does *not* require direct proof of motive. The "pretext plus" rule urged by petitioners and adopted by the First, Sixth, and Seventh Circuits undermines this principle.

Petitioners, their *amici* and, indeed, the courts that have adopted pretext plus are notably reticent in explaining precisely what kind of evidence a plaintiff must introduce in order to establish the "plus." Their position is clearly that proving pretext, that is, that the reasons offered are not the true reasons, is insufficient. It is necessary to adduce some additional quantum of evidence to establish that the pretext was advanced for the purpose of discrimination. Respondent urges that the reticent is not inadvertent; it is clear that the inevitable consequence of adopting the "pretext plus" rule is to require direct evidence of discriminatory motive.[18]

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[17]If, contrary to the opinion below, personal animosity in this case is held to be legally relevant, then remand for review of this factual finding would be necessary. The court of appeals characterized the district court's view of the motivations as an "assumption" without evidence to support it. A-10.

[18]*See generally*, Catherine Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the 'Pretext-Plus' Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 99 (1991). Lanctot notes that some pretext-plus courts have usurped the role of the fact finder in determining the credibility and weight of statements, and have kept

As discussed in Part I, *supra*, *Burdine* holds that a plaintiff may demonstrate pretext "*either directly* by persuading the court that a discriminatory reason more likely motivated the employer *or indirectly* by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256 (emphasis added). Respondent maintains that *Burdine*'s use of the disjunctive, on its face, means simply that a plaintiff may discharge his ultimate burden of persuasion by proof of *either* of the stated options. That is, a plaintiff may prove directly that discrimination was the motive, or may, to equal effect, demonstrate discrimination indirectly by proving that the stated reasons are themselves not credible. Thus, for the reasons discussed above at length, proof of pretext without more discharges the plaintiff's ultimate burden of persuasion, and compels judgment for him.

Petitioner and their *amici*, in contrast, deny that rebuttal of the employer's articulated reasons is necessarily sufficient to discharge plaintiff's burden of persuasion. Their argument necessarily negates the second part of the *Burdine* rule as an alternative method of proceeding, and submerges it into the first method of proving pretext, namely through direct evidence of motive. Imposing an utterly new requirement of some undefined *additional* proof of discrimination onto the final step of the *McDonnell Douglas/Burdine* test, would effectively overrule the entire line of *McDonnell Douglas* cases. Thus, the reach of Title VII would be limited to only the most blatant "smoking gun" violations.

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cases with direct evidence of discriminatory animus from the jury, casting substantial "doubt on the [pretext-plus] rule's theoretical underpinning."

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE EVIDENCE DEMONSTRATED AN ABSENCE OF DISCRIMINATION.

Even if this Court were to decline to apply *McDonnell Douglas* to this case, a remand would be necessary. Respondent's claim of retaliation, which was not addressed by the district court, was reserved by the court of appeals. Pet. A-12 n.9. In addition, Respondent contended below that the District Court's findings regarding other evidence of discrimination were erroneous as a matter of law and fact.

Thus, the district court erred as a matter of law in relying on the racial composition of the disciplinary review boards to discount the evidence of their discriminatory actions against Respondent. Although the board's actions were characterized by the court as "harsh," the court concluded that they could not have been discriminatory because black as well as white persons sat on the boards. Pet. App. A-28. This Court has rejected the reasoning "that human beings would not discriminate against their own kind — in order to find that the presumption of purposeful discrimination was rebutted." *Castaneda v. Partida*, 430 U.S. 482, 500 (1977). Reliance solely on the board's composition, rather than findings about its operation and reasons for acting was therefore error. Further, the district court's conclusion overlooked the fact that the decision to fire Respondent by Mr. Long overruled the board's recommendation that he merely be suspended.

Similarly, the district court's holding that the fact that thirteen blacks were hired to work at the St. Mary's somehow was proof that the decision to *fire* Hicks was not discriminatory was wrong as a matter of law. The claim in this case is that Hicks was fired in order to get rid of black supervisors, a claim buttressed by the facts that 12 out of the

13 persons fired were black and that the number of black supervisors declined from 5 of 6 to 2 of 6. The hiring of lower-level black correctional officers (and, incidentally, Mr. Long did not have control over such officers, J.A. 66, 67) in no way disproves that claim. Nor did the fact that *if* another black had taken a supervisory position then there would have been an equal number of black and white supervisors rebut that claim. *See Furnco*, 438 U.S. at 579 ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.") For the same reasons, the fact that disciplinary action was not taken against Mr. Hick's subordinates, who were also black, is simply irrelevant to his claim.

CONCLUSION

The judgement of the court of appeals should be affirmed.

Respectfully submitted,

*CHARLES R. OLDHAM
LOUIS GILDEN
317 N. 11th Street
Suite 1220
St. Louis, MO 63101
(314) 231-0464

ELAINE R. JONES
CHARLES STEPHEN RALSTON
ERIC SCHNAPPER
MARINA HSIEH
99 Hudson Street
Suite 1600
New York, NY 10013
(212) 219-1900

Counsel for Respondent

* *Counsel of Record*